

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of Executive Homes Minnesota, LLC	RECOMMENDED ORDER AFFIRMING CEASE AND DESIST ORDER AND TO IMPOSE DISCIPLINARY ACTION
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This matter comes before Administrative Law Judge Raymond R. Krause following a hearing pursuant to an Order to Show Cause and Notice of and Order for Hearing dated September 19, 2006. The hearing in this matter was held at the Office of Administrative Hearings on February 24, 2007 and February 26, 2007, concluding on February 26, 2007. Pursuant to the request of the Administrative Law Judge, the parties submitted and filed post-hearing briefs addressing the legal question of the applicability of the State Building Code in this case and summarizing their cases. Executive Homes Minnesota (Respondent) filed its post-hearing brief on March 13, 2007 and the Department of Labor and Industry (Department) filed its post-hearing brief on March 14, 2007. The record in this matter closed on March 14, 2007.

Christopher M. Kaisershot, Assistant Attorney General, NCL Tower, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Labor and Industry. James Peirce, the former manager of Executive Homes Minnesota, LLC, 331 2nd Street W., Hector, Minnesota 55342, represented Respondent.

STATEMENT OF ISSUES

1. Whether the Department's August 16, 2006, Cease and Desist Order was valid and whether Respondent violated the Order by continuing to cause, permit, or perform construction-related activities on the four-plex townhouse development located at lots 1, 2, 3, and 4, Block 10, School Estates, City of Nicollet (the Townhouse). The ALJ finds that the Order was valid and Respondent did violate the Cease and Desist Order.

2. Whether Respondent failed to comply with the Department's information requests of May 3, July 10, or July 12, 2006 and refused to allow inspection of the premises on August 16, 2006, in violation of Minn. Stat. § 45.027, subds. 1a and 7(a)(3), and 326.91, subds. 1(5) and 2 (2004). The ALJ finds that the Respondent did comply with the information request of May 3, 2006 but failed to comply with the other information requests or to permit inspection on August 16, 2006.

3. Whether the State Building Code is the proper standard for use in connection with the warranty provisions of Minn. Stat. § 327A.02 and whether that standard applies in a jurisdiction which has not adopted the State Building Code. The ALJ finds that the State Building Code is the proper standard and does apply in this case and therefore engaged in acts that demonstrate that is untrustworthy, incompetent and otherwise unqualified.

4. Whether Respondent failed to comply with the State Building Code when it designed and constructed the Townhouse thus engaging in acts that demonstrate that Respondent is untrustworthy, incompetent, or otherwise unqualified to act under the license granted by the Commissioner of the Department of Labor and Industry. The ALJ finds that Respondent did fail to comply with the State Building Code.

5. Whether Respondent engaged in a fraudulent, deceptive or dishonest practice by performing plumbing work on the Townhouse without a plumbing license. The ALJ finds that Respondent did engage in work outside the scope of its license by plumbing without a license for the period prior to August 11, 2006 and therefore engaged in a fraudulent or dishonest practice.

6. Whether Respondent engaged in a fraudulent, deceptive, or dishonest practice by submitting a permit application to the City of Nicollet stating that plumbing would be done by one plumber and then later substituting another plumber. The ALJ finds that Respondent did not engage in a fraudulent, deceptive or dishonest practice by substituting one subcontractor for another.

7. Whether Respondent provided false and misleading information to the Department and otherwise engaged in a deceptive or dishonest practice by misrepresenting to the Department that the Qualified Person was an engineer. The ALJ finds that Mr. Peirce, as Respondent's Qualified Person, did provide false or misleading information in violation of Minn. Stat. §§ 45.027, subd. 7(a)(3), and 326.91, subd. 1(2).

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On September 15, 2005, the Department issued a residential building contractor's license to Respondent pursuant to Minn. Stat. § 326.84 (2004).¹

2. Melanie Peirce signed the license application as Respondent's owner, partner or officer. Mr. James Peirce (Mr. Peirce) signed as its qualifying person.²

3. On October 15, 2005, Respondent obtained a building permit to construct a four-plex townhouse in the City of Nicollet.³

4. The applicant for the Building Permit was Mr. Peirce. The owner of the property listed on the permit was Executive Homes Minnesota, LLC.⁴

5. Respondent constructed the Townhouses for the purpose of selling them.⁵

6. At the time that Respondent began constructing the Townhouses, the State Building Code was not adopted or enforced by the City of Nicollet.⁶

7. In a letter dated April 20, 2006, the Administrator for the City of Nicollet wrote to the Department citing a number of structural concerns he and the Nicollet City Council had about the Townhouse project. The letter stated, among other things, "[t]he Nicollet City Council is concerned about the safety and welfare of any of our residents who may purchase these homes."⁷

8. In response to the City of Nicollet's letter, on May 3, 2006, the Department wrote to Respondent, informing Respondent of the complaint, with a copy of the City's letter enclosed. The Department's letter requested that Respondent "provide this office with your written response to the concerns identified by the City's . . . Administrator and make sure you specifically address the foundation failure and provide us with all documentation, including any possible Engineering reports relating to foundation failure." The letter also indicated that someone from the Building Codes and Standards Division of the

¹ Hearing Exhibit (Ex.) Z.

² Ex. Z.

³ Ex. A.

⁴ Ex. A.

⁵ Exs. R, U, W, X and Y and Testimony of Marc Chadderdon (Chadderdon testimony).

⁶ Testimony of Michael Fricke (Fricke testimony), Ex. 3. See Minn. Stat. §§ 16B.59, 16B.62, 16B.72, 16B.73.

⁷ Ex. A.

Department would visit the property and would likely be in contact with Respondent to follow up if there were questions or concerns.

9. On May 16, Respondent submitted a written reply to the information request. The reply acknowledged that it was sent in compliance with Minn. Stat. § 45.027 and stated that the Townhouses complied with the “Minnesota State Building Code 2000, the Minnesota Energy Code 2000 MN Rule chapter 7672 . . . [and with the] International Residential Code 2003.” The letter also assured the Department that I & S Engineers, located in Mankato, Minnesota “will be certifying that the foundation is now and always was adequate.”⁸ This report was never provided to the Department because I & S Engineers declined to provide the requested certification.⁹

10. Following this exchange, Department personnel met with Mr. Peirce on several occasions to discuss their concerns about the Townhouses. On May 24, 2006, Mr. Peirce met with Department staff Doug Nord, Supervisor for Regional and Administrative Services and Michael Fricke, Building Code Representative, at the Townhouse construction site.¹⁰

11. During the May 24 meeting, Nord and Fricke reviewed their concerns with Mr. Peirce about the foundation’s construction; property line/unit separation walls; parapet walls and exceptions; beams, in relation to size, load and span; and the height of the tall walls.¹¹

12. On June 1, 2006, Mr. Peirce met with Department personnel at the Department’s offices in St. Paul. In addition to Peirce, Fricke and Nord, the June 1 meeting was attended by Department personnel Dan Kelsey, an administrative structural engineer, and Don Sivigny, an energy specialist. The purpose of this meeting, which Mr. Peirce attended voluntarily, was to review the Department’s concerns and to discuss plans to address those concerns. The Department made specific recommendations to Mr. Peirce, which he stated that he understood. One of the recommendations was that he hire a Minnesota licensed structural engineer to investigate and review the areas of concern and, if required, design and detail the requirements to bring those areas into code compliance.¹²

13. Michael Fricke and Herman Hauglid, a Senior Investigator with the Licensing and Enforcement division at the Department, visited the Townhouse site on July 7, 2006 to review the progress Respondent was making in addressing the concerns which had been raised in May and June.¹³

⁸ Ex. C.

⁹ Testimony of James Peirce (Peirce).

¹⁰ Ex. D., Fricke and Peirce testimony.

¹¹ Ex. D.

¹² Ex., D, Fricke and Peirce testimony.

¹³ Ex. E., Fricke and Herman Hauglid (Hauglid) testimony.

14. The Department concluded, as a result of the July 7, 2006 visit, that the “contractor has continued to proceed with the work without regard to address (sic) the concerns that were discussion with him @ (sic) the June 1st meeting.” Additional concerns became apparent during the July 7 visit, including a floor joist beam which had been notched to make room for a waste line for a bathroom, a lack of protective water barriers behind tubs, questions about support of a ridge beam above the entry door, support and cantilever of the same ridge beam and valley beams, construction of a ridge beam in the room next to the entry and the support of that same beam which was hung from a “TJI” rafter. After Fricke and Hauglid reviewed all of these concerns with Peirce, Peirce said “he would get on them right away.” Finally, Fricke and Hauglid discussed the separation walls between units and the Department’s concern that “one unit has been covered with gypsum board and there is no way to tell whether the issues we discussed before have been corrected or not.”¹⁴

15. Jim Shay of the Department’s plumbing unit visited the Townhouse construction site on July 6 and had some serious concerns with the plumbing on the project. During a telephone call on July 7, 2006, with Mr. Hauglid, Mr. Peirce stated that he did all of the plumbing for the project.¹⁵ At the hearing, Mr. Peirce did not remember the specifics of this conversation, but stated that Respondent had performed plumbing on the Townhouses before August 11, 2006.¹⁶

16. Peirce Properties, an unlicensed plumbing contractor, received a code compliance bond on August 11, 2006. The plumbing contractor named on the bond is Jason Peirce.¹⁷

17. Peirce Properties performed plumbing on the Townhouse project during the period of August 11 through August 21, 2006.¹⁸

18. In a letter dated July 10, 2006, the Department stated that it was requiring Respondent to provide the following by July 18, 2006:

A Minnesota licensed structural engineers (sic) report containing an evaluation for the complete foundation system, including but not limited to soil, drainage, strip footings, slab, frost protection, insulation and attached garage issue.

Evaluation and approval from a Minnesota licensed structural engineer for the notched LVL valley beams and an evaluation and approval of the load transfers and support beam construction.

¹⁴ Ex. E.

¹⁵ Ex. F.

¹⁶ Ex. F. and Peirce testimony.

¹⁷ Hearing Exhibit (Ex.) 2.

¹⁸ Peirce testimony.

Evaluation and approval from the manufactures (sic) engineers for the attachment ridge beam to the TJI to carry roof loads.

A construction detail drawing of the center separation/bearing wall (complete top to bottom) and listed assembly number.

Evaluation report from the manufacturers (sic) engineers for the cut TJI in the bathroom ceiling. Copies of engineered repair design and clear pictures of the completed repair will be required.

Evaluation and approval from a Minnesota licensed structural engineer for the ridge beam (2 X 6 and OSB) construction and rafter support.

A construction detail showing unit fire separation for side by side units going from floor through the roof.

Construction details for the exterior walls, the ceiling/attic, and foundation.

A letter from Bruce Nelson for "Reflectix" material and its application.¹⁹

19. In a letter dated July 12, 2006, Herman Hauglid wrote to Respondent asking for the report from I & S Engineers that Respondent had discussed in its May 13 letter; and requesting evidence to support Mr. Peirce's claim that he was an engineer and was "personally responsible for verifying the engineering calculation on this project."²⁰ Mr. Peirce has engineering training and experience but is not a certified engineer.²¹

20. Respondent did not submit any written reply to either the July 10 or the July 12 letters.²²

21. In a letter dated July 18, 2006, James Peterson, Plumbing Program Supervisor at the Department, informed Respondent that James Shay, Plumbing Standards Representative, had conducted an inspection of the Townhouses and found numerous violations of the rules governing plumbing. In addition, the letter stated that neither Mr. Peirce nor Respondent had filed a plumbing code compliance bond.²³

¹⁹ Ex. G.

²⁰ Ex. H.

²¹ Peirce Testimony.

²² Peirce testimony.

²³ Ex. I.

22. Respondent replied to the Department's July 18 letter with a letter dated July 25, 2006, acknowledging that it had not obtained a plumbing code compliance bond but that such a bond was "in the process of being secured." This letter also addressed the plumbing concerns raised by the Department, in some instances stating what had been done to correct a problem, in others stating that the Department had inaccurate information or that it had accurate information but that the problem would be cured.²⁴

23. On or about July 28, 2006, Justin Peirce entered into a Contract for Deed with Respondent to purchase Unit 1 of the Townhouses.²⁵

24. Herman Hauglid left four messages on Mr. Peirce's voice mail in an attempt to schedule a follow-up inspection in August 2006. The last of these messages informed Mr. Peirce that Department representatives would be coming to the Townhouses to conduct a site inspection on August 16 and that Mr. Peirce should contact Mr. Hauglid if that date was not convenient for Respondent. Mr. Hauglid received no response to any of the messages he left for Mr. Peirce.²⁶

25. Mr. Peirce denied that he received any of the messages from Mr. Hauglid about the August 16 site visit.²⁷

26. On arriving at the construction site on August 16, Department representatives Michael Fricke and Dan Kelsey found no sign of Mr. Peirce. "No Trespassing" signs, which had not been present at Fricke's prior visits to the site, were posted on the property. Fricke and Kelsey chose to heed the "No Trespassing" signs and did not go onto the Townhouse property. Instead, they telephoned Mr. Peirce again, leaving him a message. They waited for about 15 minutes, and then went to have lunch, returning to the site in hopes of meeting Mr. Peirce there later. Mr. Peirce did not respond to their message, nor did they find him at the construction site, so they did not inspect the Townhouses that day.²⁸ Respondent's failure to respond to any of the telephone calls about the August 16, 2006 site visit, combined with its display of "No Trespassing" signs at the site, effectively prevented the Department personnel from conducting the site visit on that day.

27. On August 16, 2006, the Department served Respondent with a Cease & Desist Order and Notice to Right of Hearing ("Order"). The Order requires Respondent to "cease and desist from causing, permitting, or performing any construction-related activities on the Townhouse . . . until (1) Respondent complies with the Department's information requests dated May 3, July 10, and July 12, 2006, and (2) satisfies the Department that Respondent's townhouse

²⁴ Ex.J.

²⁵ Ex. U and V; Peirce testimony.

²⁶ Hauglid testimony.

²⁷ Peirce testimony.

²⁸ Fricke and Kelsey testimony.

design and construction, including any necessary corrective action on the townhouse, complies with the State Building Code.”²⁹

28. On August 21, 2006, Mr. Peirce resigned from his position as Manager of Respondent Executive Homes Minnesota, LLC.³⁰ From the date of his resignation, continuing to the date of the hearing, Mr. Peirce did not believe he had authority to act as Respondent’s Qualifying Person under Minn. Stat. § 326.84.³¹ There was no evidence produced at hearing that demonstrated notice to the Department of Mr. Peirce’s resignation or application for a new qualifying individual.

29. On September 13, 2006, Nicollet County Sheriff’s Office Investigator Marc Chadderdon went to the Townhouses pursuant to a request from the Nicollet County Attorney’s Office.³²

30. At the Townhouses, Mr. Chadderdon “noticed that there was a lot of activity at the south townhouses.” The garage doors were open on the south units and several vehicles were parked in front of the property, including a 1987 red Jaguar with license plates listed to Respondent, a van with license plates listed to Otto Electric and a white work van whose license plates he was unable to read.³³

31. Mr. Chadderdon took thirteen pictures of the outside of the property and the parked vehicles with his digital camera. In one of those pictures, a realtor’s “For Sale” sign is plainly visible, along with a second sign which says “Model Home” with an arrow pointing to unit #1. Another photograph shows a large blue dumpster full of scrap drywall and another shows forms and debris piled up on the street on the north side of the building.³⁴

32. While Mr. Chadderdon was at the work site, a man came out of unit #1. His clothes were dirty with a white substance which Mr. Chadderdon stated looked like drywall dust and he wore yellow safety glasses. Based on these observations, Mr. Chadderdon assumed the man was a construction worker of some kind.³⁵

33. In response to Mr. Chadderdon’s inquiry about whether the owner was present, the “worker” stated that he was inside and he offered to go get him. Mr. Peirce came outside then and spoke with Mr. Chadderdon.³⁶

²⁹ Ex. K.

³⁰ Peirce testimony.

³¹ Id.

³² Ex. Q., Chadderdon testimony.

³³ Id.

³⁴ Chadderdon testimony, Exs. R. and Q.

³⁵ Chadderdon testimony, Ex. Q.

³⁶ Ex. Q., Chadderdon testimony.

34. During his conversation with Mr. Chadderdon, Mr. Peirce stated that he had personal ownership of unit #1 of the Townhouses and that that was the only unit he was working on. He further stated that he was aware of the Cease and Desist order but believed that, because he planned on moving into Unit #1, he should be permitted to work on it. He asked Mr. Chadderdon to take a complaint from him against the Department because he alleged that the Cease and Desist Order was issued illegally.³⁷

35. On September 14, 2006, Respondent, through its attorney, requested a hearing to contest the Cease and Desist Order, but waived its right to a hearing within 10 days.³⁸

36. On September 19, 2006, the Department issued a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause and Statement of Charges (OSC) in this matter. The Statement of Charges included the following alleged violations:

Count I: Respondent violated the August 16, 2006 Cease and Desist Order by continuing to cause, permit, or perform construction-related activities on the Townhouse.³⁹

Count II: Respondent failed to comply with the Department's information requests dated May 3, July 10 or July 12, 2006, and refused to allow inspection of the premises on August 16, 2006.⁴⁰

Count III: Respondent failed to comply with the Building Code when it designed and constructed the Townhouse located on Block 10, School Estates, City of Nicollet, State of Minnesota. Respondent engaged in acts that demonstrate it is untrustworthy, incompetent, or otherwise unqualified to act under the license granted by the Commissioner.⁴¹

Count IV: Respondent performed plumbing work on the Townhouse, even though it is not licensed as a plumber. Respondent engaged in a fraudulent, deceptive or dishonest practice.⁴²

Count V: Respondent submitted a permit application to the City that that (sic) stated Nicollet Plumbing & Heating would perform all plumbing work on the Townhouse. In fact, Respondent has

³⁷ Id.

³⁸ Ex. L.

³⁹ Minn. Stat. § 45.027, subd. 7(a)(2) and 326.91, subd. 1(5) (2004).

⁴⁰ Minn. Stat. § 45.027, subds. 1a and 7(a)(3) and 326.91, subds. 1(5) and 2 (2004).

⁴¹ Minn. Stat. § 45.027, subd. 7(a)(4) and 326.91, subd. 1(6)(2004).

⁴² Minn. Stat. § 326.91, subd. 1(2) (2004) and Minn. R. 2891.0040, subp. 1G (2005).

performed the plumbing work. Respondent engaged in a fraudulent, deceptive or dishonest practice.⁴³

Count VI: Respondent misrepresented to the Department that he was an engineer. Respondent provided false and misleading information to the Department and otherwise engaged in a deceptive or dishonest practice.⁴⁴

37. In the time between September 2006 and the date of the hearing, work was done on the exterior of the townhouses, including installation of the outside surfaces covering the Tyvek moisture barrier, although there was no evidence to show at whose direction or by whom the work was being done.⁴⁵

38. On November 27, 2006, Executive Homes Minnesota, LLC executed a quit claim deed for Lot 1, Block 10, School Estates, 106 Traci Lane, Nicollet, Minnesota to Melanie Peirce for \$500 or less. That quit claim deed was signed by Mr. Peirce, Manager of Executive Homes Minnesota.⁴⁶

39. On January 5, 2007, Respondent permitted Department personnel to conduct a site inspection. Michael Fricke and Daniel Kelsey inspected the Townhouses, observing, among other things, that additional construction had occurred since their August 16, 2006 visit.⁴⁷

40. At the hearing, the Department identified the following nine areas in which the construction and engineering of the Townhouse did not comply with the State Building Code or were otherwise unacceptable building practices:⁴⁸

a) Foundation insulation and frost protection: Expanded polystyrene foam was used for the foundation insulation, rather than the extruded foam insulation required by the 2000 International Residential Code (IRC) which was in effect at the time of construction.⁴⁹ Use of the wrong kind of insulation could result in frost heaves and freezing in the foundation, causing the building to shift.⁵⁰

b) Soils, drainage and strips footings and frost protection: The method used by Respondent to construct the foundation was not consistent with the 2000 IRC. Respondent used the 2003 IRC and ASCE 32. The foundation was installed by excavating 30 inches

⁴³ Minn. Stat. § 326.91, subd. 1(2) (2004).

⁴⁴ Minn. Stat. § 45.027, subd. 7(a)(3) and 326.91, subd. 1(2) (2004).

⁴⁵ Chadderdon testimony.

⁴⁶ Ex. Y.

⁴⁷ Fricke and Kelsey testimony; Ex. O.

⁴⁸ Exs. M and N. Fricke and Kelsey testimony.

⁴⁹ Ex. N: 2000 IRC, R 403.3.

⁵⁰ Fricke testimony, Ex. M.

and pouring a concrete strip footing, with a short concrete foundation wall on top of the 20 x 20 strip footing. Two-inch Bead Board (expanded polystyrene) was placed on the foundation wall 20-inches down and 24-inches wide; and the foundation was backfilled with a sand base. The 2000 IRC requires a single, monolithic poured concrete foundation, extruded polystyrene insulation (except when used vertically) and screened and washed gravel or crushed stone. The technique prescribed by the 2000 IRC is designed to keep the foundation from freezing and shifting in the cold southern Minnesota climate.⁵¹

c) Insulation for attached garages: The same method of footings and foundation used for the townhouses (described in paragraphs a and b, above) was also used for the attached garages. This construction method poses problems for frost protection and the ability to maintain a minimum temperature of 64 degrees Fahrenheit in the garages. The 2000 IRC standards do not permit garages to be attached to dwelling units with frost-protected shallow foundations as Respondent's townhouses are.⁵²

d) Property line, unit separation and parapet walls: The state building code requires minimum separation between attached townhouse units to keep fire from moving from one unit to another. The center walls separating the dwelling units utilize these walls to attach the ceiling joists for support of the lofts directly to the center wall framing members. The ceiling joists would create "voids" in the sheetrock every couple of feet in the upper part of the wall separating the units. This results in a wall that is not consistent with tested assembly methods for fire protection and does not provide fire protection as required for a wall separating townhouse units. The requirement for fire protection between units is either double 1-hour fire-resistive walls or a single 2-hour resistive wall. Respondent's construction methods achieve neither of these levels of protection. In addition, attached buildings are required to have fire protective 30" high parapet walls on the exterior of the roof between units or, in the alternative, a layer of 5/8" chip board on top of the roof rafters before the roof decking or shingles are put on. The townhouses in this project have neither kind of required fire protection. The result of Respondent's failure to build appropriate protections between units is that fire in one unit could quickly spread to the others.⁵³

⁵¹ Ex. M., Fricke testimony.

⁵² Exs. M and N: 2000 IRC R.302, 321.2, 403.3(1), Fricke and Kelsey testimony.

⁵³ Exs. M and N, Fricke testimony.

e) Tall wall construction: Tall walls are walls over ten feet tall. The state building code caps the height of load-bearing walls at ten feet, taking into account factors such as wind speeds and snow load in Nicollet County.⁵⁴ The townhouses have walls that exceed the ten-foot height maximum utilizing a “stacked wall” construction method. A stacked wall puts multiple walls on top of one another, attaching them vertically by “end-nailing” them into the wood so that they are unable to resist lateral movement, essentially acting like hinges that can fold even with the pressure of the wind. The danger resulting from this includes property damage such as cracking walls or, more seriously, walls buckling in the wind.⁵⁵

f) Notching and/or cutting laminated veneer lumber (LVL) valley beams: The state building code does not permit cuts, notching or bored holes in LVL.⁵⁶ Respondent notched the valley beams in all of the townhouses to allow for the installation of vertical posts. LVL is a pre-engineered material designed to carry prescribed loads. Cutting into the material as Respondent has can cause the beam to become structurally unsound.⁵⁷

g) Cutting an engineered floor truss to allow for the installation of plumbing pipe: Respondent used wooden I-beams to support the floors. Using such I-beams provides structural efficiency. I beams, which concentrate the thickness of the wood at the outer edges, are stronger and more rigid than 2x10 or 2x12 where there is an equal amount of wood throughout the height of a board. The structural stiffness and strength of an I-beam is compromised if the outer edges, which give the beams their strength and rigidity, are cut. Respondent cut through at least one such I-beam to allow for the installation of a pipe. This is a violation of the State Building Code.⁵⁸

h) Ridge beam and rafter support and trusses: The state building code generally prescribes that a roof constructed with rafters should have ceiling joists at the bottom of the rafters, also joining with the walls.⁵⁹ In some instances those joists are moved higher and, when a vaulted ceiling is designed, horizontal ties are also used. The reason for the horizontal ties is to prevent the two sides of the ceiling, which are leaning up against one another, from flattening and pushing out against one another. If horizontal ties are

⁵⁴ Ex. N: 2000 IRC R. 602.3.

⁵⁵ Ex. M., Kelsey testimony.

⁵⁶ Ex. N: 2000 IRC R. 802.7.2.

⁵⁷ Kelsey testimony.

⁵⁸ Ex. N: 2000 IRC R. 502.8.2, Ex. M., Kelsey testimony.

⁵⁹ Ex. N: 2000 IRC, R. 802.3 and R. 301.1.2.

not used, then a beam must be installed at the ridge, which is the top. The purpose of the ridge beam is to carry the load of the ceiling and of the two sides of the vaulted ceiling which otherwise would be pressuring one another. A ridge beam must be designed in accord with accepted engineering practice. Typically, contractors use pre-engineered lumber instead of “building up” a beam on site, but Respondent made the ridge beams for the roofs in the townhouses on site. The beam is made from 2 x 6 boards, wooden I-beams and “a patchwork of oriented strand board,” all of which are not a standard design and which would need further review to determine their structural integrity. Furthermore, the support depends on a single I-beam as well as a connection from the ground which “would warrant a closer look.” Should this ridge beam fail, the roof would likely collapse into the room below.⁶⁰

i) Roof framing – non-continuous bearing support for the ridge beam: The ridge beam described in paragraph h, above, concentrates or “collects” the load of the roof and is typically supported by studs which run all the way down to the foundation. In this case, some of the studs have other boards nailed between them and some of the studs do not reach the full height of the ridge beam they are to support. Other boards are “scabbed on” to the studs to make up for the height necessary to reach the ridge beam. Thus, some of the studs meant to support the ridge beam, which itself supports the weight of the roof, are not single boards but have pieces “scabbed on” to make up the height needed to connect them to the ridge beam. This construction puts the ridge beam, and therefore the roof, at risk of collapse.⁶¹

41. No evidence was presented to show that any of the defects identified in the above paragraphs have been corrected.

42. Were Respondent to complete construction on the Townhouse project, the structural defects identified in the above paragraphs would, if not corrected, result in a building that would pose a risk to its occupants.⁶²

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

⁶⁰ Kelsey testimony.

⁶¹ Ex. M and N: 2000 IRC R. 801.2, Kelsey testimony.

⁶² Kelsey testimony.

1. Respondent was a licensed residential building contractor pursuant to Minn. Stat. § 326.83, subd. 15 at the time it began the Townhouse project in the City of Nicollet.

2. Mr. Peirce was Respondent's qualifying person as required by Minn. Stat. § 326.84, subd. 1c at the time it received its license.

3. At all times relevant to these proceedings, the City of Nicollet had declined, pursuant to Minn. Stat. §§ 16B.72 and 16B.73, to adopt or enforce the State Building Code.

4. The Commissioner of Labor and Industry (Commissioner) is authorized, pursuant to Minn. Stat. § 326.91, to take action against a residential contractor's license if the Commissioner finds that such an action is in the public interest and that the licensee:

(2) has engaged in a fraudulent, deceptive, or dishonest practice...;

(6) has been shown to be incompetent, untrustworthy, or financially irresponsible;

(7) has been convicted of a violation of the State Building Code or, in jurisdictions that do not enforce the State Building Code, has refused to correct a violation of the State Building Code when the violation has been certified by a Minnesota licensed structural engineer

5. The Commissioner has authority pursuant to Minn. Stat. § 45.027 to issue a cease and desist order "whenever it appears to the commissioner that a person has engaged or is about to engage in an act or practice constituting a violation of a law, rule, or order related to the duties and responsibilities entrusted to the commissioner."

6. Because Respondent constructed the Townhouses for the purpose of sale, it is a "vendor" within the meaning of the statutory warranty provisions at Minn. Stat. § 327A.01, subd. 7.

7. As a vendor pursuant to Minn. Stat. § 327A.01, subd. 7, Respondent is required to build the Townhouses to the "building standards" referred to in § 327A.01, subd. 2 which are the "standards of the State Building Code . . . in effect at the time of the construction or remodeling."

8. "In effect at the time of the construction or remodeling" refers to the State Building Code which is currently in statute. Section 327A, subd. 2 is not

limited to the specific locales within the state which have adopted the code or where it is otherwise required by law to be enforced.

9. The Department is required to administer the Contractor's Recovery Fund which is generally liable for judgments arising out of a licensed contractor's "failure of performance," including statutory warranties.⁶³

10. When a licensed contractor is a vendor for purposes of the statutory warranty provisions of section 327A.01 and thus falls within the scope of the Department's potential liability pursuant to section 326.975, it is reasonable for the Department to rely on the State Building Code standards referred to in section 327A.01, subd. 2 in determining whether a licensed residential contractor is "incompetent or untrustworthy" pursuant to Minn. Stat. § 326.91, subd. 1(6).

11. Respondent has not "refused to correct a violation of the State Building Code when the violation has been certified by a Minnesota licensed structural engineer" because no violation of the State Building Code was certified as required by Minn. Stat. § 326.91, subd. 1(7).

12. The rules governing residential building contractors state that it is a "fraudulent, deceptive or dishonest practice" for a residential contractor to knowingly contract for, or perform, "a service beyond the scope of the license."⁶⁴ Section 326.83, subd. 19 lists the skills which a residential building contractor may provide. Plumbing services are not listed in that subdivision. Respondent's plumbing work on the Townhouses violated section 326.83, subd. 19 and Minn. R. pt. 2891.0040, subp. 1.G.

13. Respondent's manager and qualified person, Mr. Peirce made repeated statements that he is an engineer and that he would use his expertise as an engineer to address issues related to the construction of the Townhouses. These statements fall within the conduct prohibited by Minn. Stat. § 326.02.⁶⁵

⁶³ Minn. Stat. § 326.975, Hauglid testimony.

⁶⁴ Minn. R. pt. 2891.0040, subp. 1.G.

⁶⁵ Minnesota statutes section 326.02, subd. 1 requires that "any person . . . practicing, or offering to practice . . . professional engineering . . . shall be licensed or certified as hereinafter provided." The same statute makes it "unlawful for any person to practice, or to offer to practice . . . professional engineering . . . or to otherwise assume, use or advertise any . . . description tending to convey the impression that the person is a . . . professional engineer."

Minnesota statutes, section 326.02, subd. 3 states that

[a]ny person shall be deemed to be practicing professional engineering . . . who holds out as being able to perform or who does perform any technical professional service, such as planning, design or observation of construction for the purpose of assuring compliance with specifications and design, in connection with any . . . buildings . . . wherein the public welfare or the safeguarding of life, health, or property is concerned . . . when such . . . service requires the application of the principles of mathematics and the physical and applied engineering sciences, acquired by education or training, and by experience.

14. Respondent's failure to construct the Townhouses to the standards required by Minn. Stat. § 327A.01, its provision of plumbing services beyond the scope of its license in violation of Minn. R. pt. 2891.0040, subp. 1.G., and the statements of its manager and qualified person, Mr. Peirce, that he is an engineer in violation of Minn. Stat. § 326.02 justify the Department's decision to issue a cease and desist order under Minn. Stat. §45.027, subd. 5a.

15. The Department has proven the allegations in Count I of the OSC as follows:

Respondent allowed Peirce properties to do plumbing work between August 11 and August 21, 2006, thus violating the Cease and Desist order by causing or permitting construction-related activities to continue on the Townhouse between August 17 and August 21.

Respondent, which held legal title to all four Townhouses at least until November 27, 2006 and continues to hold legal and equitable title to at least Units 2, 3 and 4, caused or permitted construction-related activities, or performed those activities, on the Townhouses, including, but not limited to, covering the Tyvek moisture barriers on the outside of the Townhouses by installing outside surfaces over the moisture barriers.

16. The Department has proven the allegations in Count II of the OSC as follows:

Respondent failed to respond to the Department's July 10 or July 12 letters requesting information about the concerns raised with Respondent about the Townhouse construction. This failure to respond to an information request violates Minn. Stat. §§ 45.027, subd. 1a and 7(a)(3); and 326.91, subd. 1(5).

Respondent did respond to the Department's May 3, 2006 information request.

17. The Department has proven the allegations in Count III of the OSC as follows:

Respondent's construction methods, specifically as outlined in paragraphs 40(a) through 40(i) of the Findings of Fact, violated the standards established by the State Building Code and form an adequate basis for the Department to determine that Respondent is

“incompetent and untrustworthy” pursuant to Minn. Stat. § 326.19, subd. 1(6).

18. The Department has proven the allegations in Count IV of the OSC as follows:

The rules governing residential building contractors state that it is a “fraudulent, deceptive or dishonest practice” for a residential contractor to knowingly contract for, or perform, “a service beyond the scope of the license.”⁶⁶ Section 326.83, subd. 19 lists the skills which a residential building contractor may provide. Plumbing services are not listed in that subdivision. By providing plumbing services to the Townhouse project during the period before August 11, 2006, Respondent engaged in a “fraudulent, deceptive or dishonest practice” under the rule and Minn. Stat. § 326.91, subd. 1(2).

19. The Department has failed to prove the allegations in Count V of the OSC. Count V alleged that Respondent submitted a permit application to the City that stated Nicollet Plumbing & Heating would perform all plumbing work on the Townhouse, that Respondent has performed the plumbing work and that therefore Respondent engaged in a fraudulent, deceptive or dishonest practice. Nothing in the statute or rule prohibits a contractor from choosing to work with a subcontractor who is different from the one with whom the contractor originally had planned to work.

20. The Department has proven the allegations in Count VI of the OSC as follows:

Respondent misrepresented to the Department that he was an engineer. Respondent provided false and misleading information to the Department and otherwise engaged in a deceptive or dishonest practice.⁶⁷

21. Section 326.84 of the Minnesota statutes requires that, “[f]or a limited liability company, the qualifying person must be a chief manager or managing employee.” Because no managing employee of Executive Homes Minnesota, LLC other than Mr. Peirce was qualified to be a qualifying person under the statute and because Mr. Peirce resigned from his position with the

⁶⁶ Minn. R. pt. 2891.0040, subp. 1.G.

⁶⁷ Minn. Stat. §§ 45.027, subd. 7(a)(3), 326.02 and 326.91, subd. 1(2) (2004).

company on August 21, 2006, Respondent has been without a qualifying person since August 21, 2006.

22. Pursuant to Minn. Stat. § 326.875, “[w]ritten notice must be given to the commissioner by each licensee of any change in . . . qualifying person...not later than 15 business days after the change.” Respondent’s failure to provide such a notice to the Department is a violation of Minn. Stat. § 326.875.

23. Minn. Stat. § 326.88 restates the 15-day notice requirement quoted in paragraph 22, above and allows the licensee “120 days from the departure of the qualifying person to obtain a new qualifying person. Failure to secure a new qualifying person with 120 days will result in automatic termination of the license.” Under the language of this statute, Respondent’s license was automatically terminated on or about November 21, 2006.

24. These conclusions are reached for the reasons discussed in the attached Memorandum, which is incorporated by reference into these conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that:

1. The August 16, 2006 Cease and Desist Order issued by the Department requiring Respondent to cease and desist from causing, permitting, or performing any construction-related activities on the townhouses or properties located at Blocks 5, 6, 10 and 11, School Estates, City of Nicollet, State of Minnesota be **AFFIRMED**, and made permanent and;

2. The Department impose disciplinary action against Respondent pursuant to Minn. Stat. 326.91.

Dated: April 12, 2007

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported: 7 Tapes-No Transcript

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Application of State Building Code

The Administrative Law Judge requested that the parties submit post-hearing briefs addressing the question of whether the State Building Code can be used as the minimum standard to which licensed residential contractors are held when the construction project at issue is in a jurisdiction that has not adopted the State Building Code.⁶⁸ Throughout these proceedings, Respondent has argued that, because the City of Nicollet had not adopted the State Building Code, it did not apply and therefore could not be enforced against Respondent's townhouse project in the City of Nicollet. The Department maintained that the State Building Code constitutes the minimum standard for all licensed residential contractors, regardless of where in the state they are building.

Building Code Enforcement

Although it may seem logical on one level that the State Building Code cannot be enforced where it does not apply, it also is logical that a contractor licensed by the state to build dwellings that the licensee intends to sell to the public should be held to a set of standards which comprise the minimum standards for building such dwellings. In determining whether the State Building Code may be used to evaluate a licensee's competence and trustworthiness, it is necessary to construe a number of statutes, some of which initially appear to be in conflict.

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."⁶⁹ Here, the State Building Code provisions which permit non-metropolitan counties and small municipalities to decide that the State Building Code will not apply within their jurisdictions seems to conflict with the statutory warranty provisions applying the State Building Code standards to a dwelling built by "any person, firm or corporation which constructs dwellings for the purpose of sale" ⁷⁰ Respondent argues that, because jurisdictions that do not adopt the code do not do inspections under the code, any building built in these jurisdictions has failed by definition to comply with the code and, applying the Department's logic, every builder who builds them is therefore "incompetent or untrustworthy" under the Minn. Stat. § 326.91, subd. 1(6) and therefore subject to licensing action.

None of the Department personnel who visited the Townhouse property ever testified that they were there to "enforce the building code." Respondent has not been convicted of a violation of the State Building Code, nor has such a violation been certified by a Minnesota licensed structural engineer. Mr. Fricke

⁶⁸ See Minn. Stat. §§ 16B.59, 16B.72, 16B.73.

⁶⁹ Minn. Stat. § 645.16 (2006).

⁷⁰ Minn. Stat. §§ 327A.01 (2006).

specifically testified that he was not doing “building code inspections” for purposes of enforcing the State Building Code when he visited the Townhouse property.⁷¹ Respondent is correct in his assertion that, because of this, the Department could not properly take a licensing action against Respondent based on Minn. Stat. § 326.91, subd. 1(7).

Statutory Warranty Standards

Respondent makes two additional arguments based on the language of the statutory warranty provisions in support of its position that the State Building Code cannot be used as the minimum standard to which it is held. First, quoting the language at Minn. Stat. § 327A.01, subd. 2, which states that “building standards” . . . are the “standards of the State Building Code . . . in effect at the time of the construction or remodeling,” Respondent argues that because the State Building Code was not in effect in the City of Nicollet, there were no “standards of the State Building Code . . . in effect at the time of the construction.” This argument would result in the additional words “in the jurisdiction in which the dwelling is being constructed” being “read in” to the statute to narrow its effectiveness. It is not up to a court, or an agency, to “supply words that the legislature either purposely omitted or inadvertently left out.”⁷² If statutory warranties are to apply to dwellings built everywhere in the state, then the “building standards” on which they are based must also apply everywhere.

The legislature could have chosen to specify some other building standards, or it could have required the Department, or some other state agency, to create different building standards for the purposes of application of the statutory warranties. But the legislature chose to use the standards set forth in the State Building Code. Section 327A.01 uses the State Building Code standards without reference to the procedures for enforcing the building code. It simply holds a vendor to the State Building Code standards for purposes of application of the warranties required by the statute.

Statutory Warranty: Sale Requirement

Respondent also points out that section 327A.02 of the statutory warranty provisions state that “[i]n every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee. . .” and that the Department is not the vendee and so cannot invoke the building standards referred to in the warranty statute. While it is true that the Department is not the vendee, it is nonetheless potentially a liable party under the warranty statute and the Contractor’s Recovery Fund. The Department is not invoking the warranty provisions of section 327A.02. It is, however, attempting to protect potential buyers, as well as the public purse, in holding contractors to the

⁷¹ Fricke testimony.

⁷² *Vlahos v. R&I Constr. Of Bloomington, Inc.*, 676, N.W. 2d 672, 681 (Minn. 2004).

standards set forth in the statute. This is reasonable and supported by the statutory scheme that links the Department, contractors and the warranty provisions.

Furthermore, there was evidence to support the conclusion that Unit 1 has been sold, through both a contract for deed to Justin Peirce; and a quitclaim deed to Melanie Peirce, thus arguably beginning the running of time under the warranty statutes and the real potential for liability by the Contractor's Recovery Fund.⁷³ Even if Respondent has not sold any units for purposes of the Contractor's Recovery Fund, the Department need not wait for a structural defect to result in damage to either property or person to invoke the State Building Code.

Fraudulent and Deceptive Practices

The Department has alleged that several actions by Respondent were fraudulent and deceptive. First is the fact that Respondent performed work outside of the scope of a license for a general contractor. Mr. Peirce testified that what plumbing work was done prior to August 11, 2006, was done by Respondent. Respondent, as a general contractor, is not licensed to do the plumbing. This work was outside the scope of the license and thus violated Minn. Stat. § 326.91, subd. 1(2) (2004) and Minn. Rule 2891.0040. subp. 1G (2005).

Second, the Department alleges that Respondent used a different plumber than the one listed on the building permit application to do the plumbing after August 11, 2006. The plumber employed by Respondent was Peirce Properties Inc. Although this company is not a licensed plumber, it did obtain the needed bond and thus qualified to do the work. No ordinance of the City of Nicollet or state statute or rule was cited that prohibits a general contractor from substituting one subcontractor for another after the permit is obtained. This, in and of itself, does not constitute a fraudulent or deceptive practice.

Third, the Department alleges that Mr. Peirce held himself out to the employees of the Department as being an engineer and therefore capable of doing the calculations necessary to make the structural decisions involved with the questions the Department raised. While Mr. Peirce may have had some engineering education and experience, he is not a certified engineer. Minn. Stat. § 326.02 states, "It shall be unlawful for any person to... use in connection with the person's name, or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is [a] ... professional engineer... unless such person is qualified by licensure or certification under sections 326.02 to 326.15. Mr. Peirce held himself out as an

⁷³ Given the relationships between Justin Peirce (son of James Peirce) and Melanie Peirce (owner of Respondent, wife of James Peirce), it is not clear whether or to what extent the statutory warranties apply. Nonetheless, two "sales" of Unit 1 have apparently taken place.

engineer and thereby attempted to mislead the Department into accepting his assurances that he was competent to perform the structural calculations. While he may indeed be capable of performing the calculations, the statute is clear that he may not claim that status unless certified.

Cease and Desist Order

Respondent argues in its summation brief that the Department exceeded its statutory authority in issuing the August 16, 2006 Cease and Desist order, relying on *In the Matter of Certificate of Authority of Mutual Protective Ins. Co.*⁷⁴ In the *Mutual Protective* case, the Minnesota Court of Appeals held that the Department of Commerce exceeded its statutory authority when it issued a Cease and Desist order pursuant to Minn. Stat. § 45.027 instead of an Order to Show Cause pursuant to Minn. Stat. § 60A.052, subd. 2, the statute regulating insurance companies.

In *Mutual Protective*, the Commerce Department's only authority for issuing a Cease and Desist order was Minn. Stat. § 45.027, subd. 5a(a) which states:

Whenever it appears to the commissioner that a person has engaged or is about to engage in an act or practice constituting a violation of a law, rule, or order related to the duties and responsibilities entrusted to the commissioner, the commissioner may issue and cause to be served upon the person an order requiring the person to cease and desist from violations.

The court in *Mutual Protective* held that the Commerce Department's determination that the insurance company was in financial danger did not rise to the level of a violation, or imminent violation, of an applicable law or rule, so it was incorrect for the Commerce Department to proceed under section 45.027. This situation differs from *Mutual Protective* in several key ways. First, in this situation the Department did determine that Respondent's actions constituted violations of the building standards which the Commissioner of Labor and Industry is required to oversee. Respondent's decision to build townhouses with the intent to sell them invoked the standards of the State Building Code, as discussed above.

The Department found that Respondent had failed to meet a number of minimum standards designed to protect property and safety. In addition, Respondent, despite some actions and words that seemed to indicate a willingness to work to correct the problems, refused to actually take any corrective actions over a period of months, instead focusing on arguments about whether those minimum standards should apply.

⁷⁴ 633 N.W. 2d 567 (Minn. App. 2001).

In addition to violating the minimum building standards requirements, Respondent violated laws prohibiting it from providing services beyond the scope of its license, as discussed in Conclusion 18, above. Finally, the statements of Mr. Peirce, Respondent's manager and qualified person under the licensing statute, that he was an engineer are not simply technical violations of the statute prohibiting such statements.⁷⁵ Mr. Peirce made these statements in the context of defending construction practices that did not meet minimum standards and that resulted in dwellings that were potentially neither safe nor sound.

Given the multiple violations of the laws and rules which the Department is entrusted to enforce, the Cease and Desist order was appropriate and justified in order to protect potential buyers of the Townhouses. The Department's choice to use the Cease and Desist order as its initial remedy in this situation was consistent with the statutory language.

Respondent claims to have no knowledge of what work was done after the Cease and Desist Order was issued, or if work was done, by whom. This is disingenuous at best. These Townhomes are the property of Respondent and/or the family members of Respondent's owners and managers. Either Respondent or individuals affiliated with Respondent did the work in violation of the Cease and Desist Order or allowed it to be done by others. Either way it is a violation of the Order.

Qualifying Person

Although it was not part of the original Order to Show Cause or raised by counsel for the Department, it appears that Respondent's failure to obtain a new qualifying person within 120 days of Mr. Peirce's resignation as manager of the company resulted in automatic termination of the license. If the Commissioner finds that this automatic termination did indeed occur, it could obviate the need for further licensing action against Respondent.

R.R.K.

⁷⁵ See Minn. Stat. 326.02 (2006).